

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

Case No.: 2:21-cv-01493-CDS-VCF

Kirti A. Mehta,

Plaintiff,

## Order

V.

Victoria Partners et al.,

## Defendants.

11 Presently before this Court are motions brought by both parties, including Defendants' 1  
12 Amended Motion to Dismiss (ECF No. 9).<sup>2</sup> Also before the Court are Plaintiff Kirti A. Mehta's 2  
13 Motion to Amend/Correct Complaint (ECF No. 45), Motion to Amend (ECF No. 47), Motion 3  
14 for Reconsideration (ECF No. 49) of the Court's denial of Mehta's previously filed motion for 4  
15 injunctive relief, Motion for Sanctions (ECF No. 53), and Motion for a Hearing (ECF No. 60). 5  
16 After careful consideration of the moving papers filed by the parties, I grant Defendants' motion 6  
17 to dismiss and deny Plaintiff's motions. However, I grant Plaintiff leave to amend his complaint 7  
18 pursuant to the instructions in this Order. 8

## I. Relevant Procedural History

In August of 2021, Mehta, proceeding *pro se*, filed a complaint against Defendants setting forth what this Court liberally construes<sup>3</sup> as allegations of negligence, discrimination,

<sup>1</sup> The Defendants are Park MGM, f/k/a Victoria Partners, LLC; Marina District Development Company, LLC, d/b/a Borgata; Beau Rivage Resorts, LLC d/b/a Beau Rivage; MGM Resorts Mississippi, LLC d/b/a Gold Strike Casino Resort; Mandalay Bay, LLC d/b/a Mandalay Bay; Ann Hoff; London Swinney; William J. Hornbuckle, IV; Joseph A. Corbo, Jr.; and Ryan Guadiz (to whom I hereinafter refer to collectively as “Defendants”).

<sup>2</sup> This motion was initially filed at ECF No. 7. The Amended Motion was filed at ECF No. 9 and is the operative motion.

<sup>3</sup> Pro se pleadings are to be liberally construed. *Balisteri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

1 misconduct/retaliation, and intentional infliction of emotional distress. *See generally* ECF No. 3.  
 2 In sum, Plaintiff contends he is entitled to monetary damages for the way he was treated at the  
 3 Park MGM, an MGM property, and alleges that he was overserved alcohol, cheated via unfair  
 4 slot machines, discriminated against (in the form of not receiving complementary Bruno Mars  
 5 concert tickets) due to his national origin, and unfairly charged resort fees. *Id.*

6 On October 13, 2021, Defendants filed an amended motion to dismiss the complaint. ECF  
 7 No. 9. Plaintiff filed a timely response and a supplement to that response. ECF Nos. 11; 12.  
 8 Defendants filed a reply. ECF No. 13. Plaintiff filed a surreply. ECF No. 14. I resolve the pending  
 9 motion to dismiss herein.

10 In March and April of 2022, Mehta filed motions requesting preliminary injunctive relief  
 11 and temporary restraining orders against various combinations of Defendants for their casino  
 12 operations. ECF Nos. 24; 29; 36; 38. He sought to enjoin MGM Resorts from operating under  
 13 state gaming licenses, serving complementary drinks, or providing guests with access to ATMs.  
 14 ECF Nos. 24; 36. He also sought to enjoin all casino operators nationwide from charging resort  
 15 fees at their attached hotels. ECF No. 38.

16 On April 13, 2022, this entire case was administratively reassigned to me. ECF No. 35. I  
 17 denied Mehta's requests for injunctive relief via written order. ECF No. 44. Mehta filed a motion  
 18 for reconsideration of that order, ECF No. 49, to which Defendants filed opposition. ECF No. 54.

19 Plaintiff also filed two motions to amend the complaint. ECF Nos. 45; 47. In his first  
 20 motion to amend filed on June 21, 2022, Plaintiff represents that his first complaint cited to 28  
 21 U.S.C. § 1983 in error, and that it should be corrected to reflect in its place, violations of the  
 22 Federal Civil Rights Act of 1964. ECF No. 45 at 2-3. Plaintiff did not attach a proposed first  
 23 amended complaint to his filing. Mehta did attach a document from the American Gaming  
 24 Association discussing regulations and statutes in various states across the country. ECF No.

1 45-2. Two days later, Plaintiff filed a second motion to amend the complaint, in which he asks  
 2 this Court to amend the complaint to add new Defendants. *See generally* ECF No. 1-2. The  
 3 proposed second amended complaint cites several federal, state, and local violations as causes of  
 4 action. *See* ECF 47-1. Defendants responded to Plaintiff's motions to amend, asserting that I  
 5 should deny the motions because (1) Mehta seeks the amendments in bad faith and (2) they  
 6 were untimely filed with the purpose of avoiding a potential adverse ruling on Defendants'  
 7 pending motion to dismiss. ECF No. 51 at 4-5. Defendants further argue that the proposed  
 8 amendments are futile and would prejudice them. *Id.* at 5-6.

9       Mehta also filed a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil  
 10 Procedure. ECF No. 53. Defendants filed an opposition to that motion. ECF No. 57.

11       Finally, Mehta filed a motion for a hearing, requesting the opportunity to appear before  
 12 the Court with respect to his motion for reconsideration, ECF No. 49, of this Court's denial of  
 13 injunctive relief. *See generally* ECF No. 60. Mehta alleges that his wife, Yolanda, attempted to  
 14 book a room at the Park MGM but a casino host cancelled the reservation and served the couple  
 15 with notices of trespass. *Id.* at 2. Mehta attached both notices to his motion. ECF No. 60-1 at 1-2  
 16 (notice to Kirti Mehta); *id.* at 3-4 (notice to Yolanda Mehta).

17       **II. Legal Standards**

18       The following sets forth the applicable law and authority regarding the pending motions  
 19 before the Court. As a general matter, I liberally construe documents filed by *pro se* litigants and  
 20 afford them the benefit of any doubt. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam).  
 21 Nonetheless, despite Mehta's *pro se* status, he must comply with the Federal Rules of Civil  
 22 Procedure and the Local Rules of the United States District Court of Nevada. *See Ghazali v. Moran*,  
 23 46 F.3d 52, 54 (9th Cir. 1995) (*pro se* parties must still comply with rules and case law); *Briones v.*  
 24 *Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997) (stating that "*pro se* litigants are not

1 excused from following court rules" (italics added)).

2                   A. *Motion for Reconsideration*

3                   A motion to reconsider a final appealable order is appropriately brought under either  
 4 Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. *United States v. Martin*, 226 F.3d  
 5 1042, 1048 n.8 (9th Cir. 2000). A motion for reconsideration is not an avenue to present  
 6 arguments already raised; that is, a motion for reconsideration is not a mechanism for an  
 7 unsuccessful party to reiterate arguments previously presented. *See Maraziti v. Thorp*, 52 F.3d 252,  
 8 255 (9th Cir. 1995); *Khan v. Fasano*, 194 F.Supp.2d 1134, 1136 (S.D. Cal. 2001) ("A party cannot  
 9 have relief under this rule merely because he or she is unhappy with the judgment."). "In order  
 10 for a party to demonstrate clear error, the moving party's arguments cannot be the same as those  
 11 made earlier." *Glavor v. Shearson Lehman Hutton, Inc.*, 879 F. Supp. 1028, 1033 (N.D. Cal. 1994) (citing  
 12 *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985)).

13                   Pursuant to Rule 60(b), reconsideration is appropriate only upon a showing of: (1)  
 14 mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) an  
 15 adverse party's fraud, misrepresentation, or other misconduct; (4) a void judgment; (5) a  
 16 satisfied, released, or discharged judgment; or (6) any other reason justifying relief from the  
 17 operation of the judgment. Fed. R. Civ. P. 60(b); *see also Kona Enters, Inc. v. Estate of Bishop*, 229 F.3d  
 18 877, 890 (9th Cir. 2000) (a motion for reconsideration should not be granted, absent highly  
 19 unusual circumstances, unless the district court is presented with newly discovered evidence,  
 20 committed clear error, or if there is an intervening change in the controlling law).

21                   A party can obtain relief under Rule 60(b) only upon an adequate showing of exceptional  
 22 or extraordinary circumstances. *Maraziti*, 52 F.3d at 254. A Rule 60(b) motion must be filed  
 23 within a reasonable time: for reasons (1) through (3), that time is not more than one year after  
 24 the judgment, order, or proceeding was entered. Fed. R. Civ. P. 60(b). Errors of law are

1 cognizable under Rule 60(b)(1). *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350  
 2 (9th Cir. 1999).

3 This district's local rules regarding civil cases require that any motion for reconsideration  
 4 **"must state with particularity the points of law or fact that the court has overlooked or**  
 5 **misunderstood.** Changes in legal or factual circumstances that may entitle the movant to relief  
 6 also must be stated with particularity." LR 59-1 (emphasis added).

7       B. *Motions to Amend*

8       Rule 15 of the Federal Rules of Civil Procedure advises that the Court should freely grant  
 9 leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is "to be applied  
 10 with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.  
 11 2001)(quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)). "[T]he  
 12 rule favoring liberality in amendments to pleadings is particularly important for  
 13 the *pro se* litigant. Presumably unskilled in the law, the *pro se* litigant is far more prone to make  
 14 errors in pleading than the person who benefits from the representation of counsel." *Lopez v.*  
 15 *Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (quoting *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.  
 16 1987)) (italics added).

17       There are five factors used to assess the propriety of a motion for leave to amend: (1) bad  
 18 faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5)  
 19 whether the party has previously amended its pleading. *United States v. Corinthian Colls.*, 655 F.3d  
 20 984, 995 (9th Cir. 2011). Among these factors, prejudice to the opposing party carries the  
 21 greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2011).

22       The local rule regarding motions to amend the complaint states, "[u]nless the court  
 23 orders otherwise, the moving party must attach the proposed amended pleading to a motion  
 24 seeking leave of the court to file an amended pleading." LR 15-1(a). The proposed amended

1 pleading must be complete in and of itself without reference to the superseded pleading. *Id.*

2                   C. *Motions to Dismiss*

3                   The Federal Rules of Civil Procedure require a plaintiff to plead “a short and plain  
4 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).  
5 Dismissal is proper if the complaint lacks a “cognizable legal theory” or “sufficient facts alleged  
6 under a cognizable legal theory.” *Balistreri*, 901 F.2d at 699 (9th Cir. 1988). A pleading must give  
7 fair notice of a legally cognizable claim and a plaintiff must proffer “enough facts to state a claim  
8 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). “A claim  
9 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
10 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This standard  
11 “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

12                  If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
13 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
14 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant to Fed. R.  
15 Civ. P. 15(a), a court should “freely” give leave to amend “when justice so requires,” and in the  
16 absence of a reason such as “undue delay, bad faith or dilatory motive of the part of the movant,  
17 repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the  
18 opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” *Foman*  
19 *v. Davis*, 371 U.S. 178, 182 (1962).

20                  III.     Analysis

21                  I first deny Mehta’s request for oral argument on his motion for reconsideration. I  
22 proceed by denying Mehta’s motion for reconsideration of my order denying his motion for  
23 injunctive relief and his motions to amend the complaint. Next, I grant Defendants’ motion to  
24 dismiss. Finally, I deny Mehta’s motion for Rule 11 sanctions against Defendants.

#### A. Mehta's Motion for Hearing is Denied

I begin by noting that I may decide the matters herein without holding a hearing. See Fed. R. Civ. P. 78(b) (stating that the Court may provide for determining motions on briefs, without oral hearings); LR 78-1 (stating that all motions may be decided without a hearing). Mehta’s standalone motion for a hearing violates this District’s local rules. See LR 78-1 (“Parties must not file separate motions requesting a hearing.”). Additionally, Mehta’s motion attempts to add additional claims against Defendants and possibly introduce a second Plaintiff to the action. See ECF No. 60 (describing perceived mistreatment based on the notices of trespass sent from MGM to Mehta and his wife). Despite the defects of Mehta’s motion, I considered the arguments therein but deny his request for oral argument. For the reasons described *infra*, Mehta cannot demonstrate any basis in fact or law to obtain reconsideration of my Order denying his requested injunctive relief. Prolonging the specter of such a nationwide injunction prohibiting MGM from operating its casinos would unnecessarily burden Defendants with this litigation. Accordingly, his Motion for Hearing (ECF No. 60) is DENIED.

*B. Mehta Does Not Set Forth a Basis for this Court to Reconsider its Prior Order Denying His Motion for a Preliminary Injunction and Temporary Restraining Order*

17 Mehta’s motion for reconsideration fails to demonstrate any mistake, newly discovered  
18 factual circumstance, or intervening law that would suggest I reconsider my prior order. The  
19 brief motion for reconsideration asks this Court to reevaluate and reconsider “all motions where  
20 casinos are ‘getting away with murder,’” and reasserts that the public’s interest in injunctive  
21 relief is “paramount.” ECF No. 49 at 2. Liberally construing the brief motion, the Court  
22 interprets Plaintiff’s basis for reconsideration as alleging the Court made a mistake in denying  
23 his motions for injunctive relief (ECF Nos. 24; 29; 37; 38) and requesting relief under Fed. R. Civ.  
24 P. 60(b)(1). However, contrary to the local rules, the motion does not identify with particularity

1 the points of law or fact where the Court was mistaken. *See* LR 59-1. Moreover, and fatal to his  
2 motion, Mehta fails to cite to any points and authorities in support of his motion for  
3 reconsideration. Local Rule 7-2(a) states that all motions filed in this Court “must be supported  
4 by a memorandum of points and authorities,” and subsection (d) of the same rule states that the  
5 “failure of a moving party to file points and authorities in support of the motion constitutes a  
6 consent to the denial of the motion.” LR 7-2(a), (d). Even liberally construing Plaintiff’s motion,  
7 without more information or points and authorities to support thereof, I cannot grant Mehta’s  
8 request. Mehta’s motion for reconsideration (ECF No. 49) is therefore DENIED.

9       C. *Plaintiff’s First Motion to Amend the Complaint Fails to Comply with the Local Rules*

10       While I am to apply the policy of Rule 15 of the Federal Rules of Civil Procedure advising  
11 that I grant leave to amend a party’s pleadings freely when justice so requires with “extreme  
12 liberality,” *Owens*, 244 F.3d at 712 (quoting *Morongo*, 893 F.2d at 1079), Mehta has failed to attach  
13 an amended complaint to his motion to amend the complaint. *See generally* ECF No. 45. District of  
14 Nevada Local Rule 15-1(a) states that “[u]nless the court orders otherwise, the moving party  
15 **must** attach the proposed amended pleading to a motion seeking leave of the court to file an  
16 amended pleading.” LR 15-1(a) (emphasis added). “The proposed amended pleading must be  
17 complete in and of itself without reference to the superseded pleading and must include copies  
18 of all exhibits referred to in the proposed amended pleading.” *Id.* In contravention of that rule,  
19 Mehta failed to attach a copy of the proposed amended pleading to his first motion to amend. *See*  
20 ECF No. 45. Instead, the motion states that he would like to amend one cause of action to  
21 another. *See generally* Proposed Amendments, ECF No. 45-1. Plaintiff’s noncompliant motion  
22 renders the Court unable to determine whether the proposed amendment is itself permissible,  
23 i.e., whether it results from undue delay, is made in bad faith, will cause prejudice to the  
24 opposing party, or is a dilatory tactic. Accordingly, Plaintiff’s first motion to amend the

1 complaint (ECF No. 45) is DENIED.

2       D. *Mehta's Second Motion to Amend is Denied*

3       Generally, Plaintiff's second motion to amend (ECF No. 47) seeks to add several new  
 4 Defendants<sup>4</sup> to already alleged claims for relief and to amend the claims for relief. Plaintiff's  
 5 Motion openly admits it seeks amendment so that Defendants' motion to dismiss will be  
 6 mooted. See ECF No. 47 at 2, ¶9. Mehta's proposed amended complaint drastically changes the  
 7 issues facing Defendants in this case. I find that allowing Mehta to add a variety of defendants  
 8 and claims at this stage would unfairly prejudice Defendants and deny Mehta's motion.

9       However, I am mindful that Rule 15(a) provides that leave to amend "should be freely  
 10 granted when justice so requires," bearing in mind that "the underlying purpose of Rule 15 ... [is]  
 11 to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*,  
 12 203 F.3d 1122, 1127 (9th Cir. 2000) (internal quotation marks omitted). I am also mindful of my  
 13 duty "to ensure that *pro se* litigants do not lose their right to a hearing on the merits of their claim  
 14 due to ignorance of technical procedural requirements." *Balistreri*, 901 F.2d at 699. This Order  
 15 provides relevant information to Mehta regarding the deficiencies in his pleadings. Denying  
 16 Plaintiff's motion to amend and dismissing most of Mehta's claims without prejudice will allow  
 17 Mehta, to the extent he is able, to cure the deficiencies in his pleadings, and if he so chooses, to  
 18 file an amended complaint. Accordingly, Mehta's Motion to Amend (ECF No. 47) is DENIED  
 19 without prejudice.

20  
 21       

---

  
 22       <sup>4</sup> As set forth in Plaintiff's proposed amended complaint, the new Defendants are identified as  
 23 Travis Lunn, the new President of Borgata Casino in Atlantic City, NJ; Niklas Ryttnerstrom, President and  
 24 Chief Operating Officer of the Mirage Casino; Brandon Dardeau, President and Chief Operating Officer of  
 25 Beau Rivage Casino and Gold Strike Casino; Clive Hawkins, President and Chief Executive Officer of the  
 26 Aria Casino; Chuck Bowling, President and Chief Executive Officer of Mandalay Bay. See ECF No. 47-1 at  
 27 1.

## 1       E. Defendants' Motion to Dismiss is Granted

2       Plaintiff alleges six claims for relief in the Complaint: (1) negligence (against Defendants  
 3 Park MGM and MGM International<sup>5</sup>); (2) willful and wonton [sic] misconduct (against all  
 4 Defendants<sup>6</sup>); (3) national origin discrimination (against MGM International); (4) violation of  
 5 the 14th Amendment (against MGM International); (5) retaliation (against MGM  
 6 International); and (6) emotional stress and distress (against all Defendants). *See* ECF No. 3  
 7 (Complaint). Defendants<sup>7</sup> argue that dismissal is appropriate for all causes of action set forth in  
 8 the complaint. *See generally* ECF No. 9. First, Defendants argue that Plaintiff signed a release that  
 9 bars him from bringing a cause of action for negligence, and further, that even if the release had  
 10 not been signed, Plaintiff's negligence claim still fails because Plaintiff impermissibly seeks  
 11 economic damages. *Id.* at 11-3. Second, Defendants argue that the second claim for relief, titled

12  
 13       <sup>5</sup> At the time Defendants filed their Motion to Dismiss, MGM International had not been served.  
 14 ECF No. 9 at 3. Waiver of service was filed on behalf of Park MGM, LLC; Ann Hoff; London Swinney;  
 15 William J. Hornbuckle, IV; Joseph A. Corbo, Jr.; Ryan Guadiz; Marina District Development Company,  
 LLC d/b/a Borgata; Beau Rivage Resorts, d/b/a Beau Rivage, LLC; MGM Resorts Mississippi, LLC, d/b/a  
 Gold Strike Casino Resort. *See* ECF No. 6.

16       <sup>6</sup> All Defendants are identified in the complaint as: (1) "Beau Rivage Resorts, LLC ("Beau Rivage"),  
 17 named as Beaurivage Casino. a subsidiary of "MGM International, Inc.;" (2) MGM Resorts Mississippi,  
 LLC, d/b/a Gold Strike Casino Resort ("Gold Strike"), named as Gold Strike Casino, a subsidiary of "MGM  
 18 International, Inc.;" (3) Mandalay Bay, LLC d/b/a Mandalay Bay, named as Mandalay Bay Casino, is a  
 subsidiary of "MGM International, Inc.;" (4) Park MGM, LLC, f/k/a Victoria Partners, LLC ("Park MGM"),  
 19 improperly named as Victoria Partner d/b/a Park-MGM, Casino & Hotel Operator' (5) Marina District  
 Development Company, LLC, d/b/a Borgata ("Borgata"), named as Borgata Casino, is a subsidiary of "MGM  
 20 International, Inc.;" (6) President of Park MGM, Ann Hoff; (7) Vice President, Casino Operations at Park  
 MGM, London Swinney; (8) President and CEO of "MGM International Inc., William J. Hornbuckle, IV,  
 21 named as Bill Hornbucker; (9) Senior Vice President and Legal Counsel with MGM International, Joseph  
 A. Corbo, Jr., named as Joseph A. Carbo, Jr.; and (10) Park MGM Casino Host Ryan Guadiz.

22       <sup>7</sup> The Court recognizes that the complaint sets forth claims for relief from all Defendants (claims 2  
 23 and 6), and claims for relief against only certain Defendants (claims 1, 3, 4, and 5), and further that only  
 Defendants Hornbuckle, Hoff, Swinney, Corbo, Guadiz, Beau Rivage, Gold Strike, Mandalay Bay, Borgata,  
 24 and Park MGM are parties to the Motion to Dismiss (ECF No. 9). For ease in resolving the dismissal  
 motion, the Court refers to "Defendants" generally but means to include only the specific Defendants  
 identified in the complaint.

1 “willful and wanton misconduct,” is one based in fraud and the complaint fails to meet the  
 2 heightened pleading requirements set forth in Federal Rule of Civil Procedure 9(b). *Id.* at 13-16.  
 3 Further, Defendants argue that Mehta’s sixth claims also fails because “emotional distress” is a  
 4 type of damages, not an independent cause of action. *Id.* at 16-17. Last, Defendants argue that the  
 5 remaining causes of action (the civil rights (national origin) violation, the violation of the 14th  
 6 Amendment of the U.S. Constitution, and the claim of retaliation) fail because they are alleged  
 7 against MGM International, Inc., who still has not been served.

8 Plaintiff filed an opposition to the motion. ECF No. 11. Liberally construing Mehta’s  
 9 opposition, it appears he challenges the authenticity of the release Defendants allege he signed  
 10 and contends that the release is null and void. *Id.* at 1-2. The opposition also cites cases  
 11 discussing the court’s responsibility to liberally construe *pro se* filings and the standard for  
 12 amending the complaint. *Id.* at 2-5. Last, the opposition requests this court impose Rule 11  
 13 sanctions against Defendants, or, in the alternative, to allow for an amendment to the complaint.  
 14 *Id.* at 5.

15 *i. Negligence Claim Fails Due to Economic Loss Doctrine*

16 Here, construing the facts in the light most favorable to Plaintiff, the Court finds that  
 17 Plaintiff may have alleged sufficient factual material to state a claim for negligence, but that  
 18 Defendants’ assertion of the economic loss doctrine bars Plaintiff from proceeding.

19 First, I address Plaintiff’s *prima facie* case for negligence. In Nevada, “[i]ssues  
 20 of negligence are properly resolved by a jury.” *Brascia v. Johnson*, 781 P.2d 765, 767 (Nev. 1989).  
 21 “[T]o prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a  
 22 duty of care, (2) breach of that duty, (3) legal causation, and (4) damages.” *Sanchez v. Wal-Mart*  
 23 *Stores, Inc.*, 221 P.3d 1276, 1280 (Nev. 2009).

1 The existence of a duty is “a question of law to be determined solely by the courts.”

2 *Turner v. Mandalay Sports Entm't, LLC*, 180 P.3d 1172, 1177 (Nev. 2008). Generally, a premises owner  
 3 or operator owes entrants a duty to exercise reasonable care. *Foster v. Costco Wholesale Corp.*, 291  
 4 P.3d 150, 152 (Nev. 2012). Breach and proximate cause, however, are generally questions of fact  
 5 for the jury to decide. *Id.* at 153; *Lee v. GNLV Corp.*, 22 P.3d 209, 212 (Nev. 2001). The complaint  
 6 asserts that Plaintiff was invited to the Park MGM and during his stay, he was overserved  
 7 alcohol by Park MGM employees, which resulted in damage to him. ECF No. 3 at 7. These  
 8 allegations suffice to state a claim to relief that is plausible on its face to satisfy the *Iqbal* and  
 9 *Twombly* standards with respect to the elements of negligence.

10 Having determined that Mehta has stated a claim upon which relief could be granted, I

11 first address Defendants' argument that the parties entered into a Release Agreement that bars  
 12 Mehta from bringing the negligence claim in the complaint. “Generally, a district court may not  
 13 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion...[h]owever,  
 14 material which is properly submitted as part of the complaint may be considered on a motion to  
 15 dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)  
 16 (citations omitted). “[A] court can consider a document on which the complaint relies if the  
 17 document is central to the plaintiff's claim, and no party questions the authenticity of the  
 18 document.” *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007) (citing *Warren v. Fox Family*  
 19 *Worldwide, Inc.*, 328 F.3d 1136, 1141 n. 5 (9th Cir. 2003)); *see also Lee v. City of L.A.*, 250 F.3d 668, 688  
 20 (9th Cir. 2001) (“If the documents are not physically attached to the complaint, they may be  
 21 considered if the documents' ‘authenticity...is not contested’ and ‘the plaintiff's complaint  
 22 necessarily relies’ on them” (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998))).  
 23 Here, Mehta contests the authenticity of the Release Agreement that Defendants argue bars  
 24 Mehta's negligence claim. See ECF No. 11 at 1-2 (seeming to argue that Mehta's son signed the

1 agreement and claiming MGM can neither produce witnesses to Mehta's signature nor provide  
2 video evidence of the signature). Thus, Defendants cannot meet the precondition to the  
3 incorporation-by-reference doctrine. Consequently, the Court declines to consider the Release  
4 Agreement pursuant to the incorporation-by-reference doctrine and denies Defendants' motion  
5 to dismiss the negligence claim based on a Release Agreement the Court cannot properly  
6 consider at this time.

7 The Court does however grant Defendants' motion to dismiss the negligence action  
8 based on the economic loss doctrine. "Purely economic loss is generally defined as the loss of the  
9 benefit of the user's bargain, including pecuniary damage for inadequate value, the cost of repair  
10 and replacement of a defective product, or consequent loss of profits, without any claim of  
11 personal injury or damage to other property." *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev.  
12 2000), *overruled on other grounds by Olson v. Richard*, 89 P.3d 31, 31–33 (Nev. 2004). Nevada applies  
13 the economic loss doctrine to bar strict products liability and negligence claims. *Id.* (citing  
14 American Law of Products Liability (3d) § 60:39, at 69 (1991) (the economic loss doctrine bars  
15 unintentional tort claims when a plaintiff seeks to recover "purely economic losses")); *see also*  
16 *Terracon Consultants Western, Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 86 (Nev. 2009) (stating that  
17 generally, the economic loss doctrine bars unintentional tort actions for "purely economic  
18 losses"). The economic loss doctrine does not bar actions seeking damages for pecuniary losses  
19 that are "accompan[ied by] personal injury or property damage." *Terracon Consultants Western*, 206  
20 P.3d at 86 (discussing *Local Joint Executive Bd.*, 651 P.2d 637, 638 (Nev. 1982)). Here, as it relates to  
21 the negligence claim, Plaintiff has not alleged any personal injury or injury to property. Instead,  
22 he seeks only to recover economic damages, specifically, gaming losses from his play at the Park  
23 MGM. *See generally* ECF No. 3 at 8. Defendants' motion to dismiss Mehta's negligence claim is  
24 GRANTED pursuant to the economic loss doctrine.

ii. Plaintiff's Claim for Relief Titled Willful and Wanton Conduct Fails to Meet Heightened Pleading Standards for Fraud

3 Mehta's second claim for relief, titled "willful and wonton [sic] conduct," alleges that  
4 legal counsel for Defendants attempted to "deceive and cheat" him, and further that the offer to  
5 give Mehta free casino play was "designed to lie, cheat, and deceive players" like him. ECF No. 11  
6 at 10, ¶12-13. He further alleges that MGM casinos do not give players the full value of the slot  
7 play and do not disclose this fact to its customers. *Id.* at 11, ¶14. Liberally construing the pleading,  
8 the Court finds the claim could sound in fraud or it could sound in negligent misrepresentation.  
9 Plaintiff did not provide any opposition to Defendants' argument that this claim sounds in fraud.  
10 When a claim is said to be "grounded in fraud" or "sound[s] in fraud", the pleading as a whole  
11 must satisfy the particularity requirement of Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
12 1097, 1102, 1103-1104 (9th Cir. 2003). Rule 9(b) demands that the circumstances constituting  
13 allegations of fraud "be 'specific enough to give defendants notice of the particular  
14 misconduct...so that they can defend against the charge and not just deny that they have done  
15 anything wrong.'" *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Neubronner v.*  
16 *Milken*, 6 F.3d 666, 671 (9th Cir. 1993)). Stated otherwise, allegations of fraud "must be  
17 accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317  
18 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). A party  
19 alleging fraud must "set forth *more* than the neutral facts necessary to identify the transaction."  
20 *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994), *superceded by statute on other grounds*  
21 (emphasis in original). Plaintiff does not deny that this allegation sounds in fraud. The complaint  
22 does not meet the Rule 9(b) pleading requirements. Defendants' motion to dismiss Mehta's  
23 "willful and wonton conduct" claim is GRANTED, with leave to amend granted to Mehta.

### iii. Emotional Distress is Not a Cause of Action

2 Plaintiff's sixth claim for relief alleges he has been losing sleep and is experiencing  
3 financial issues, which Mehta deems "pain and suffering," resulting from the allegations in the  
4 complaint. ECF No. 3 at 18. A showing of emotional distress may satisfy the damages element in  
5 some circumstances. *S. Nevada Adult Mental Health Servs. v. Brown*, 498 P.3d 1278 (Nev. 2021) (table)  
6 (citing *Shoen v. Amerco, Inc.*, 896 P.2d 469, 477 (Nev. 1995) (recognizing "that the negligent  
7 infliction of emotional distress can be an element of the damage sustained by the negligent acts  
8 committed directly against the victim-plaintiff")). But "emotional distress" does not stand alone  
9 as a cause of action. *S. Nevada Adult Mental Health Servs.*, 498 P.3d at 1278. To survive a motion to  
10 dismiss for failure to state a claim, Plaintiff must set forth the elements of a cause of action.  
11 Plaintiff has not met this requirement. Defendants' motion to dismiss claim six is GRANTED  
12 with leave to amend.

iv. Plaintiff's Remaining Claims for Relief Fail Based on Lack of Proper Service

15 Plaintiff's remaining claims for relief, all alleged against Defendant MGM International,  
16 include an allegation of a civil rights violation (third claim for relief), an alleged violation of the  
17 14th Amendment to the United States Constitution (fourth claim for relief), and alleged  
18 retaliation (fifth claim for relief). Defendants argue that those claims fail as a matter of law  
19 because Defendant "MGM International" has not been served. ECF No. 9 at 10-11.

20 While dismissal would not be proper under Rule 12(b)(6) of the Federal Rules of Civil  
21 Procedure, dismissal of the third, fourth, and fifth claims is appropriate under Rule 12(b)(5). A  
22 party may contest the sufficiency of service of process under Rule 12(b)(5). *See* Fed. R. Civ. P.  
23 Rule 12(b)(5). A federal court lacks personal jurisdiction over a defendant if service of process is  
24 insufficient. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). “Once service is

1 challenged, plaintiffs bear the burden of establishing that service was valid under Rule 4.”  
 2 *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). “If the plaintiff is unable to satisfy this  
 3 burden, the Court has the discretion to either dismiss the action or retain the action and quash  
 4 the service of process.” *Stevens v. Sec. Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976).

5 Here, Plaintiff did not respond to Defendants’ allegation of lack of service and there is no  
 6 evidence before the Court that MGM International has been served. Accordingly, dismissal of  
 7 the remaining counts is appropriate.

8 Plaintiff’s third cause of action, alleging a civil rights violation, is dismissed without  
 9 prejudice with leave to amend. I give leave to amend because while the complaint alleges a  
 10 violation of 42 U.S.C. § 1983, which does not prescribe a private right of action,<sup>8</sup> the Court  
 11 liberally construes the complaint to allege a civil rights action generally.

12 Plaintiff’s fourth cause of action, alleging a violation of the 14th amendment of the U.S.  
 13 Constitution is dismissed with prejudice and without leave to amend. As discussed in the  
 14 Court’s Order denying Plaintiff’s motions for injunctive relief, the U.S. Constitution protects  
 15 individual rights only from government action, not from *private* action. *Single Moms, Inc. v. Montana*  
 16 *Power Co.*, 331 F.3d 743, 746 (9th Cir. 2003). Only when the government is responsible for a  
 17 plaintiff’s complaints are individual constitutional rights implicated. *Brentwood Academy v. Tenn.*  
 18 *Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001). So, Defendant cannot violate the plaintiff’s  
 19 Fourteenth Amendment substantive due process or equal protection rights unless the  
 20 government is somehow involved for the activities set forth in Mehta’s complaint. Mehta has not  
 21 set forth any allegations that the Government is involved with the issues that arose at the Park  
 22 MGM in March of 2021, nor could he. Accordingly, this claim for relief is dismissed with

23  
 24 <sup>8</sup> See, e.g., *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) (private  
 entities are generally not liable under Section 1983 because they do not act under color of state law).

1 prejudice and without leave to amend as amendment would be futile.

2 The remaining cause of action is retaliation. Liberally construed, the Complaint alleges  
 3 Defendant violated Section 1981 by retaliating against Plaintiff by not allowing him in or on to  
 4 MGM Resorts properties anywhere in the world. Section 1981 states that “[a]ll persons...have  
 5 the same right...to make and enforce contracts...and to the full and equal benefit of all laws...as is  
 6 enjoyed by white citizens.” 42 U.S.C. § 1981. “To state a claim pursuant to section 1981, a plaintiff  
 7 must allege (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the  
 8 basis of race by the defendant; and (3) the discrimination concerns one or more of the activities  
 9 enumerated in the statute.” *Keum v. Virgin Am., Inc.*, 781 F. Supp. 2d 944, 954 (N.D. Cal. 2011).  
 10 However, Section 1981 is not “a general proscription of racial discrimination...it expressly  
 11 prohibits discrimination only in the making and enforcement of contracts.” *Patterson v.*  
 12 *McLean Credit Union*, 491 U.S. 164, 176 (1989) (emphasis added). The complaint does not allege  
 13 there was a contract (either prospective or enforceable) at issue between Plaintiff and MGM  
 14 International and therefore this claim for relief fails as a matter of law. Accordingly, this claim  
 15 for relief is dismissed without prejudice, with leave to amend.

16 F. Plaintiff's Motion for Sanctions is Denied

17 Liberally construing Plaintiff's motion, Mehta asks this Court to impose sanctions upon  
 18 Defendants for opposing Plaintiff's motion to amend the complaint. *See generally* ECF No. 53. An  
 19 attorney is subject to Rule 11 sanctions, among other reasons, when he presents to the court  
 20 “claims, defenses, and other legal contentions ... [not] warranted by existing law or by a  
 21 nonfrivolous argument for the extension, modification, or reversal of existing law or the  
 22 establishment of new law[.]” Fed. R. Civ. P. 11(b)(2). The Ninth Circuit has established that the  
 23 word “frivolous” “to denote a filing that is both baseless and made without a reasonable and  
 24 competent inquiry.” *Moore v. Keegan Mgmt. Co (In re Keegan Mgmt. Co., Sec. Litig.)*, 78 F.3d 431, 434

1 (9th Cir. 1996). Plaintiff has not demonstrated that Defendants' opposition was unwarranted or  
2 frivolous. Accordingly, Plaintiff's motion for sanctions is DENIED.

3 **IV. Conclusion**

4 For the reasons set forth above, IT IS HEREBY ORDERED that Defendants Hornbuckle,  
5 Hoff, Swinney, Corbo, Guadiz, Beau Rivage, Gold Strike, Mandalay Bay, Borgata, and Park  
6 MGM's Motion to Dismiss (ECF No. 9) is GRANTED.

7 Leave to amend the complaint is granted as set forth in this Order. Mehta has twenty-  
8 one (21) days from the date of this Order to file a motion to amend his Complaint containing an  
9 attachment of his proposed amended Complaint. That Complaint must be consistent with this  
10 Order and stand on its own, without reference to the other Complaint or potential amendments.  
11 See LR 15-1 ("Unless the court orders otherwise, the moving party must attach the proposed  
12 amended pleading to a motion seeking leave of the court to file an amended pleading. The  
13 proposed amended pleading must be complete in and of itself without reference to the  
14 superseded pleading and must include copies of all exhibits referred to in the proposed amended  
15 pleading.").

16 IT IS FURTHER ORDERED that Mehta's first Motion to Amend the Complaint (ECF  
17 No. 45) is DENIED without prejudice.

18 IT IS FURTHER ORDERED that Mehta's second Motion to Amend the Complaint (ECF  
19 No. 47) is DENIED without prejudice.

20 IT IS FURTHER ORDERED that Mehta's Motion for Reconsideration (ECF No. 49) is  
21 DENIED.

22 IT IS FURTHER ORDERED that Mehta's Motion for Sanctions (ECF No. 53) is  
23 DENIED.

1 IT IS FURTHER ORDERED that Mehta's Motion for Hearing (ECF No. 60) is DENIED.  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

DATED this 2nd day of September, 2022.



Cristina D. Silva  
United States District Court Judge